

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

College of Law, Faculty Publications

Law, College of

1997

Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and *Romer v. Evans*

Richard F. Duncan

University of Nebraska College of Law, rduncan2@unl.edu

Follow this and additional works at: <https://digitalcommons.unl.edu/lawfacpub>



Part of the [Legal Studies Commons](#)

Duncan, Richard F., "Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and *Romer v. Evans*" (1997). *College of Law, Faculty Publications*. 143.

<https://digitalcommons.unl.edu/lawfacpub/143>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in College of Law, Faculty Publications by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

WIGSTOCK AND THE KULTURKAMPF:
SUPREME COURT STORYTELLING,
THE CULTURE WAR, AND *ROMER v. EVANS*

*Richard F. Duncan**

Argument is insufficient; America needs exorcism.

—Peter Kreeft¹

I. INTRODUCTION

Our society is deeply divided over the meaning of good and evil. We tell clashing stories about things that matter a great deal, things such as abortion, marriage and family, education, the role of religion in the public square, and the ethics of human sexuality.² James Davison Hunter observed that this culture war is a struggle between starkly polarized moral communities and that it represents “a strain upon the course of democratic practice.”³ Indeed, I often think America was a good idea that, sadly, has failed. Perhaps there is too much *pluribus* for there to be *unum*.

Certainly one might well reach that conclusion after reading the majority and dissenting opinions in *Romer v. Evans*,⁴ the recent

* Sherman S. Welpton, Jr. Professor of Law, University of Nebraska College of Law (rduncan@unlinfo.unl.edu). I wish to thank Tim Tymkovich, Chuck Cooper, Bob Bork, Kelly Duncan, Gary Young, and the members of the ReligionLaw list on the internet. I should disclose that I co-authored an amicus brief in support of the constitutionality of Amendment 2 in *Romer*. This Article is dedicated to my daughter, Rebecca Joy Duncan. May you, my little one, “become the mother of thousands of ten thousands; and may your descendants possess the gates of those who hate them.” *Genesis* 24:60.

1 PETER KREEFT, *ECUMENICAL JIHAD* 17 (1996).

2 See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

3 *Id.* at 316.

4 116 S. Ct. 1620 (1996). The case generated two separate opinions below by the Colorado Supreme Court. See *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (en banc); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (en banc), *aff’d*, 116 S. Ct. 1620 (1996).

Supreme Court decision that invalidated Colorado Amendment 2⁵ under the Equal Protection Clause. The opinions in *Romer*, although nearly devoid of rigorous legal analysis, are nevertheless compelling as narratives of the culture war.

The purpose of this Article is to analyze both the doctrine and the stories of *Romer*. At the end of the day, I hope to demonstrate that although *Romer* makes an insignificant contribution to the development of constitutional law, it does much to limn the nature of the Kulturkampf that threatens to irrevocably destroy our national unity.

II. THE DOCTRINE OF *ROMER*

If the only tool you own is a hammer, every problem looks like a nail.⁶ Justice Kennedy apparently thinks the people of Colorado used a hammer—Amendment 2—when a more precise instrument was called for.

Indeed, Amendment 2 is a blunt device. Even many of us who defended its constitutionality were uncomfortable with its breadth. The Amendment singled out a class of persons—homosexuals and bisexuals—and amended the state constitution to forbid all levels of state and local government from adopting any statute, ordinance, or policy designed to protect this group against discrimination. The Amendment's breadth made it possible to imagine cases in which it would bar policies designed to protect homosexuals from harms that all would acknowledge to be wrongful.

For example, suppose there was good reason to believe that certain members of the police force would refuse to protect homosexuals from violent criminal attacks.⁷ And suppose further that the police

5 If allowed to go into effect, Amendment 2 would have been COLO. CONST. art. II, § 30b:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Romer, 116 S. Ct. at 1623.

6 I believe this proverb is an old one, but I most recently encountered it in an article by Frederick Schauer. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1004 (1995).

7 Say, for example, a local newspaper had published a story about a rash of assaults on homosexuals in public parks, and undisclosed members of the police force

department, wishing to reassure the gay community that it would be served equally, adopted a policy stating that "the services of the police department are available to all without regard to race, gender, religion or *sexual orientation*." This policy, which no one could seriously object to, would have violated the Colorado state constitution if Amendment 2 had been allowed to go into effect.⁸

Of course, the people of Colorado were not seeking to deny police protection to gays and lesbians when they ratified Amendment 2. Rather, they were primarily concerned about protecting the liberty and associational rights of employers and landlords against restrictive "gay rights" ordinances enacted in Colorado's more progressive municipalities.⁹ But the broad language of the Amendment swept well beyond this reasonable terrain and literally prohibited *all* attempts by *all* levels of government to protect individuals against discrimination on the basis of homosexual "orientation, conduct, practices or relationships."¹⁰ As Justice Kennedy observed, under the Amendment homosexuals could "obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution."¹¹

If one searches for sophisticated legal reasoning in the Court's decision in *Romer* he will be disappointed, because "there is no there there."¹² Although media and academic spin doctors have pro-

were quoted as saying they would "do nothing" to protect homosexuals from these illegal attacks.

8 Laurence Tribe and several other scholars wrote a very influential amicus brief in *Romer* that repeatedly urged the Court to consider the all-encompassing scope of Amendment 2. Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as Amici Curiae in Support of Respondents, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039) [hereinafter Tribe Brief]. Tribe argued that:

[a]ll the Court needs to decide in order to affirm the judgment below is that a state's constitution *by definition* denies equal protection of the laws when it decrees that homosexuality, or indeed *any* identifying characteristic the state uses to select a person or class of persons from the population at large, may never be invoked as the basis of any claim of discrimination by such persons under any present or future law or regulation enacted by the state, its agencies, or its localities.

Id. at 3.

9 See Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 130-34 (1995).

10 *Romer*, 116 S. Ct. at 1623.

11 *Id.* at 1627.

12 The quoted language, of course, echoes Gertrude Stein's famous description of Oakland. GERTRUDE STEIN, *EVERYBODY'S AUTOBIOGRAPHY* 289 (1937). Professor

claimed *Romer* as a landmark victory for gay rights,¹³ the reality is that the opinion written by the Court is hardly a Magna Carta for homosexuals. The Court did not reverse *Bowers v. Hardwick*.¹⁴ It did not find any new fundamental rights lurking in the penumbras of the written Constitution. It did not hold that homosexuals are a suspect or quasi-suspect class under the Equal Protection Clause. It did not hold that moral disapproval of homosexual conduct is invidious. It did not hold that it is illegitimate or irrational for government to make distinctions designed to discourage homosexuality. Most emphatically, it did not say anything that calls in question laws rejecting homosexual marriage. It *did* apply the lowest level of scrutiny—the rational basis test—to laws disadvantaging homosexuals¹⁵ and explicitly held that such laws will be upheld so long as they are “narrow enough in scope and grounded in a sufficient factual context” for the Court to ascertain that there exists “some relation between the classification and the purpose it served.”¹⁶

In short, the problem with Amendment 2 was its all-encompassing breadth.¹⁷ *Romer* is not a landmark decision endorsing gay rights; it is a narrow and rather trivial application of what the Court called its “ordinary” rule that “a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for

Stephen Gillers, who agrees with the results in *Romer*, describes Justice Kennedy's majority opinion as “so weak as to be astonishing.” *Getting a Read on Romer v. Evans*, *LEGAL TIMES*, May 27, 1996, at 8.

13 On the ReligionLaw discussion group, *Romer* was compared to *Brown v. Board of Education* by some and said to have effectively overruled *Bowers v. Hardwick* by others. Newspapers across the country proclaimed a great victory for homosexual rights. The headline in the New York Times, which proclaimed “Gay Rights Laws Can't Be Banned, High Court Rules,” was typical of this spin on *Romer*. See Linda Greenhouse, *Gay Rights Laws Can't Be Banned, High Court Rules*, *N.Y. TIMES*, May 21, 1996, at A1. One legal analyst went so far as to suggest that *Romer* may require the states to recognize same-sex marriage because the heterosexual norm for civil marriage is based upon a “bare animus” against a group of people.” *Getting a Read on Romer v. Evans*, *supra* note 12, at 8. See also William Eskridge, *Credit Is Due*, *THE NEW REPUBLIC*, June 17, 1996, at 11. For a discussion of *Romer*'s impact on marriage laws, see *infra* notes 64-72 and accompanying text.

14 478 U.S. 186 (1986).

15 *Romer*, 116 S. Ct. at 1627.

16 *Id.*

17 At oral argument Justice Kennedy described Amendment 2 as creating a classification “adopted to fence out” homosexuals “for all purposes.” He then remarked “I've never seen a statute like that.” U.S. Supreme Court Official transcript at *5, *Romer*, 1995 WL 605822 (No. 94-1039).

it seems tenuous.”¹⁸ Although Colorado advanced many clearly legitimate interests in support of the Amendment—the liberty and associational interests of landlords and employers, and administrative efficiency “in conserving resources to fight discrimination against other groups,” to name a few¹⁹—the breadth of the Amendment was “so far removed from these particular justifications” that the Court found it “impossible to credit them.”²⁰ Once the Court concluded that the extreme breadth of the Amendment outran and belied “any legitimate justifications that may be claimed for it,”²¹ there was nothing left to do but to invalidate it on its face under the ordinary test applied by the Court in run-of-the-mill equal protection cases. So when all the cheering and spin-doctoring are over, *Bowers* is still the champ and *Romer* not even a contender.

A. *Bowers* and *Romer*

The argument that *Romer* significantly advances the cause of homosexual rights begins by describing the decision as inconsistent with *Bowers* and concludes that moral opposition to homosexuality is no longer a legitimate basis for laws that disadvantage homosexuals.²² *Bowers*, of course, is the Court’s 1986 landmark decision upholding the collective right of democratic self-government, the most basic liberty of a free people,²³ against the claim that consensual homosexual acts are covered by a fundamental (though unenumerated) constitutional right. The Court noted that sodomy was a criminal offense at common law, was forbidden “by the laws of the original 13 States when they ratified the Bill of Rights,” and was a crime in “all but 5 of the 37 States” in 1868 when the Fourteenth Amendment was ratified.²⁴ Indeed, the proscription has ancient roots nourished by “mil-

18 *Romer*, 116 S. Ct. at 1627.

19 *Id.* at 1629.

20 *Id.*

21 *Id.*

22 We had a lengthy group discussion of this issue on the ReligionLaw list. My views and insights have been enriched and honed by these cyberspace exchanges.

23 As Robert Bork has observed, “[t]he freedom of the majority to govern and the freedom of the individual not to be governed remain forever in tension.” ROBERT H. BORK, *THE TEMPTING OF AMERICA* 139 (1990). Justice White was very much aware of this tension in *Bowers*, and he was particularly concerned about the legitimacy of the Court adopting an expansive view of its authority to “discover new fundamental rights imbedded in the Due Process Clause.” *Bowers*, 478 U.S. at 194. “The Court is most vulnerable,” proclaimed Justice White, “and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Id.*

24 *Bowers*, 478 U.S. at 192-93.

lennia of moral teaching,"²⁵ and the Court declared it would be "facetious" for it to recognize a fundamental right to engage in homosexual sodomy.²⁶ Finally, and importantly for present purposes, *Bowers* applied a rational basis test and held that the "presumed belief" of the majority that "homosexual sodomy is immoral and unacceptable" was an adequate basis for Georgia's criminal prohibition of that conduct.²⁷ Indeed, as Justice White understood, law is "constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed."²⁸

The argument that *Romer* has effectively reversed *Bowers* proceeds backwards from Justice Scalia's dissent in the former case.²⁹ Scalia argued that it should be "obvious" that Amendment 2 is constitutional after *Bowers* because if Georgia may criminalize homosexual sodomy "surely it is constitutionally permissible" for the people of Colorado to enact a law "merely *disfavoring* homosexual conduct."³⁰ But the Court held that Amendment 2 fails the rational basis test because it was not "directed to any identifiable legitimate purpose or discrete objective."³¹ So to Scalia the legal logic is: if *Bowers*, then *Romer* is wrong. Gay rights advocates turn Scalia's analysis around and argue: if *Romer*, then *Bowers* is no longer good law.

A careful reading of *Romer*, however, demonstrates that both Scalia's criticism and the advocates' reverse spin are unjustified. *Bowers* was not dispositive of the issues in *Romer*, and therefore *Romer* does not signal the demise of *Bowers*. The primary significance of *Romer* in the evolution of constitutional law lies not in any expansion of homosexual rights, but rather upon the issue of facial challenges to overbroad legislation.

There are many rational and legitimate reasons for the government to enact laws disadvantaging (or withholding some benefit from) homosexuals. Public morality, property rights, religious liberty, and associational freedom are clearly proper ends of public policy, and any one of these purposes is an adequate foundation for typical laws that classify on the basis of sexual orientation. Amendment 2, however, went well beyond the point of implementing these purposes. It was severely overbroad in two ways. First, it imposed what the Court called a "broad and undifferentiated disability on a single named

25 *Id.* at 197 (Burger, C.J., concurring).

26 *Id.* at 194.

27 *Id.* at 196.

28 *Id.*

29 *See Romer*, 116 S. Ct. at 1631-33 (Scalia, J., dissenting).

30 *Id.* at 1631 (Scalia, J., dissenting).

31 *Id.* at 1629.

group" and proscribed laws, regulations, and policies designed to protect that group against "exclusion from an *almost limitless number* of transactions and endeavors that constitute ordinary civic life in a free society."³² Second, it allowed this disability to be lifted only by the extraordinarily difficult step of amending the state constitution.³³ This extreme overbreadth clearly troubled Justice Kennedy and the majority. It is one thing for a state to outlaw homosexual sodomy or to define marriage to exclude same-sex relationships; it is quite a different thing for the state constitution to declare homosexuals—including, apparently, those who abstain from homosexual conduct—to be akin to outlaws by denying them access to even the "possibility of protection under the laws of the state from the wrongs that may befall them."³⁴

Amendment 2 would have done much that is good had it been allowed to go into effect.³⁵ However, as the parade of horrors raised by the Justices at oral argument revealed,³⁶ it also might have prevented government policies designed to protect homosexuals against what everyone would agree are invidious (if unlikely) harms. If homosexuals should ever be denied police or fire protection, access to public libraries, or treatment at public hospitals, surely there can be no legitimate reason to forbid government from adopting remedial policies mandating that these services shall be available without regard to sexual orientation. Yet, under Amendment 2 these policies might be

32 *Id.* at 1627 (emphasis added).

33 *Id.*

34 Tribe Brief, *supra* note 8, at 8.

35 Laws forbidding private discrimination on the basis of sexual orientation restrict liberty, and stigmatize traditional beliefs about sexual ethics as invidious and immoral. For example, when the law tells a deeply religious landlord that it is wrong for her to refuse to rent an apartment to a homosexual couple, it has the effect of legitimizing homosexuality and delegitimizing the landlord's traditional religious beliefs. By passing Amendment 2, the people of Colorado decided to remove the stigma and associated harms inflicted on traditionalists by state and local homosexual rights legislation. This, in my opinion, is a very good thing to do. See Duncan & Young, *supra* note 9, at 126-30.

36 Justice Kennedy declared that he had never before seen a law that classifies a particular group and fences it out "for all purposes." Justice O'Connor worried that a homosexual who was denied the right to borrow a library book would apparently have no legal recourse. Justice Ginsburg was concerned that a hospital might deny homosexuals access to a kidney dialysis machine. Other questions focused on homosexuals hypothetically being denied services by the police, the health department, and the insurance commissioner. See, U.S. Supreme Court Official Transcript, *Romer*, 1995 WL 605822 (No. 94-1039); Linda Greenhouse, *U.S. Justices Hear, and Also Debate, a Gay Rights Case*, N.Y. TIMES, Oct. 11, 1995, at A1.

forbidden because they treat sexual orientation (including homosexuality and bisexuality) as a protected class.

At least in theory, Amendment 2 extended well beyond any legitimate state interest and, therefore, denied homosexuals equal protection of the law. This modest position represents the sum of *Romer's* impact on the equal protection issue. It poses no threat to the continued vitality of the Court's ruling in *Bowers*, because *Bowers* involved a law "narrow enough in scope and grounded in a sufficient factual context" to enable the Court to ascertain a reasonable relation between the conduct prohibited (homosexual sodomy) and Georgia's legitimate interest in prohibiting immoral behavior.³⁷

B. *Romer, Overbreadth, and Facial Invalidity*

In *Romer*, the respondents' attack on Amendment 2 was a facial challenge, and the Court's facial invalidation of Amendment 2 means it may not be enforced under any circumstances.³⁸ In contrast, when a court holds a statute unconstitutional "as applied" to a particular set of facts, the law may be enforced in other circumstances.³⁹

In *United States v. Salerno*,⁴⁰ the Court held that a facial challenge to a legislative act can succeed only if the challenger establishes "that no set of circumstances exists under which the Act would be valid."⁴¹ In other words, a facial attack on a law "will fail if the statute has *any* constitutional application."⁴² The *Salerno* Court expressly stated that the overbreadth doctrine, which holds that a party may claim a statute should not be applied to him solely because it would be unconstitutional to apply it in different circumstances to a hypothetical third party,⁴³ does not apply "outside the limited context of the First Amendment."⁴⁴

37 *Romer*, 116 S. Ct. at 1627.

38 *See id.* at 1632 (Scalia, J., dissenting).

39 *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

40 481 U.S. 739 (1987).

41 *Id.* at 745.

42 Dorf, *supra* note 39, at 239. Professor Dorf calls the *Salerno* test a "truly draconian standard" and argues that the test "finds little support in the Supreme Court's cases and is unsound in principle." *Id.* at 239, 294. Dorf argues that "substantially overbroad" laws—in the sense that potentially invalid applications are substantial when compared to valid applications—should be subject to facial invalidation. *Id.* at 276.

43 *See id.* at 261.

44 *Salerno*, 481 U.S. at 745.

In his *Romer* dissent, Justice Scalia argued that the facial challenge to Amendment 2 must fail under *Salerno*, because the Amendment was "unquestionably" constitutional in at least some applications.⁴⁵ Certainly, Scalia's argument has force. But I think there is a counterargument that also has resonance. As Professor Dorf has shown, if a statute has an "impermissible purpose, courts cannot save it by severing its unconstitutional applications. The invalid legislative purpose pervades all of the provision's applications."⁴⁶

Dorf's insight seems to explain *Romer*. Although the shallowness of Justice Kennedy's opinion rivals that of the Platte River in a drought year, he seems to conclude that the extreme breadth of Amendment 2 suggests an impermissible purpose that permeates all of the Amendment's applications. Indeed, Kennedy repeatedly makes the point that the "sheer breadth" of Amendment 2 "seems inexplicable by anything but animus toward the class that it affects,"⁴⁷ and therefore outruns and belies "any legitimate justifications that may be claimed" in support of the Amendment.⁴⁸ If you can go this far with the Court, the rest seems to follow. Because of the inference of animus drawn from the conceivably unlimited reach of the initiative, the clearly legitimate purposes advanced by the State in support of Amendment 2 were tainted and "impossible to credit."⁴⁹ This positions the case squarely within the rule of *Salerno* and facial invalidation follows inexorably.⁵⁰

Although the *Romer* opinion adopts a defensible application of rational basis review even in the context of a facial challenge, I believe the case was wrongly decided. The defensibility of the opinion turns on the Court's almost single-minded focus on the *conceivable* breadth of Amendment 2. Yes, *if* police officers refuse to protect homosexual

45 *Romer*, 116 S. Ct. at 1632 (Scalia, J., dissenting).

46 Dorf, *supra* note 39, at 279. Dorf cites *Edwards v. Aquillard*, 482 U.S. 578 (1987), as evidence that the *Salerno* rule "does not apply to facial challenges to statutes with an unconstitutional purpose." *Id.* at 280.

47 *Romer*, 116 S. Ct. at 1627.

48 *Id.* at 1629.

49 *Id.* The primary reasons advanced by the State in support of the Amendment were the liberty interests of employers and landlords, and Colorado's interest in "conserving resources to fight discrimination against other groups." *Id.* These interests are clearly legitimate ones. They failed to support Amendment 2 only because the Court found the "breadth of the Amendment" was "so far removed from these particular justifications" as to render them inoperative. *Id.* Having made this determination, the Court concluded that the Amendment "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests." *Id.*

50 *Id.*

crime victims and *if* library clerks refuse to allow homosexuals to borrow books, Amendment 2 *might* be interpreted to prohibit remedial policies specifically declaring that the government does not discriminate in the provision of these services on the basis of sexual orientation. And yes, these results are not related to any legitimate governmental purpose. But why should we think these scenarios will ever occur or were intended by the voters of Colorado when they approved the initiative? Isn't it at least possible that this hypothetical problem might be cured through a narrow interpretation of Amendment 2 when (and if) such a case should ever arise?⁵¹ As Justice Kennedy himself said in *Ohio v. Akron Center for Reproductive Health*,⁵² courts should not invalidate laws "on a facial challenge based upon a worst-case analysis that may never occur."⁵³

If Amendment 2 had been judged based upon its likely (as opposed to its imagined) applications, it would easily have survived a facial challenge under a rational basis test. Its likely and immediate impact would have been to prohibit laws and policies giving homosexuals special protection against discrimination in employment, housing, and public accommodations. It would *not* have required public or private discrimination against homosexuals; it would simply have forbidden government from adopting policies treating homosexual acts and inclinations as protected traits. It would have proscribed laws—like those enacted in Boulder, Aspen, and Denver—that specifically forbid discrimination on the basis of sexual orientation. Unlike laws that generally forbid arbitrary discrimination by public or quasi-public institutions, "gay-rights" laws single out sexual behavior and inclinations as specially protected categories and then employ the law's coercion to force dissenters to comply with this particular vision of justice.

Certainly, the people of Colorado might have had many rational and legitimate reasons for supporting a constitutional amendment designed to invalidate laws that conflate the values of the sexual revolution with those of the civil rights movement. Gay rights laws such as those enacted in Aspen, Boulder, and Denver do not bestow benefits without costs. For every economic and symbolic benefit provided homosexuals and bisexuals by gay rights laws there is a corresponding economic and social cost imposed upon others in the

51 See Dorf, *supra* note 39, at 274-75. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (holding that no rational basis exists "for permitting one student to assault another based on the victim's sexual orientation" where a public school failed to protect an openly gay student from physical assaults and harassment).

52 497 U.S. 502 (1990).

53 *Id.* at 514.

community. Homosexuals gain protected status in employment and housing; employers and landlords lose freedom of choice, control over their businesses, and perhaps even religious freedom.⁵⁴ Homosexuals gain social legitimacy when the law (in effect) declares sexual orientation, like race and gender, to be irrelevant to a person's character or worth; traditionalists, however, are stigmatized and delegitimized when the law (in effect) adopts the proposition "that opposition to homosexuality is as reprehensible as racial or religious bias."⁵⁵ Just as it is rational and legitimate for homosexuals and their advocates to support gay rights laws to acquire these benefits, it is rational and legitimate for others to seek to avoid these costs by supporting laws like Amendment 2.

C. *Romer As Law: Some Specific Applications*

Although *Romer* will be cited by gay rights advocates as controlling every case in which a law or government policy classifies on the basis of sexual orientation or behavior, the majority's narrow holding in the case suggests that this strategy is likely to be unproductive. In fact, the narrow holding of *Romer* suggests quite strongly that typical laws disadvantaging homosexuals do not offend the Equal Protection Clause. Consider, for example, the following specific applications of *Romer*.

54 For example, the Aspen ordinance, which prohibits discrimination in employment, housing, and public accommodations on the basis of sexual orientation, contains no exceptions. It applies to all employers, all housing, and all public accommodations without regard to the size of the business or the religious conscience of persons subject to the restrictions. There is not even an exception for churches and religious ministries. See Aspen, Colo. Mun. Code § 13-98. In his dissenting opinion in *Evans v. Romer*, Colorado Supreme Court Justice Erickson stated that the Aspen ordinance requires "churches to open their facilities to homosexual organizations if the facilities were opened to any community organization." *Evans v. Romer*, 882 P.2d 1335, 1363 (Colo. 1994) (en banc) (Erickson, J., dissenting), *aff'd*, 116 S. Ct. 1620 (1996). Thus, if a church in Aspen allows, say, a local right-to-life group to conduct a meeting on its premises, it must grant equal access to homosexual organizations. Of course, at least some religiously motivated dissenters might be able to claim a religious freedom exception under the First Amendment or the Religious Freedom Restoration Act. See generally Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393 (1994). But litigating a free exercise claim is not a cost-free process, and religious freedom exemptions do nothing for employers and property owners whose opposition to homosexuality is based upon secular notions of sexual morality.

55 *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

1. State Constitutional Amendments

Suppose that in response to *Romer*, the people of some state pass an initiative amending the state constitution to forbid all state and local government action that restricts “the right of private employers and property owners to take sexual orientation into account when making decisions regarding employment or the sale or rental of real property.” This hypothetical initiative accomplishes much of Amendment 2’s agenda, but it differs in significant respects from that unconstitutional provision. First, since everyone has sexual orientation, it creates a “disability” that applies to everyone, not to a “single named group.”⁵⁶ Under the hypothetical initiative, no one may use the law’s coercion to forbid private employers and landlords from treating sexual orientation as a relevant qualification for employment or housing opportunities.

Second, the hypothetical amendment applies only to a narrow range of activities and does not create a “broad and undifferentiated disability”⁵⁷ that denies “protection across the board.”⁵⁸ The parade of horrors imagined by the *Romer* majority cannot be used to slander this initiative. The hypothetical law thus succeeds where Amendment 2 failed—it is “narrow enough in scope and grounded in a sufficient factual context” to enable the Court to ascertain that there exists “some relation between the classification and the purpose it served.”⁵⁹

For example, the proposed initiative serves the legitimate interests of protecting the economic liberties, associational freedom, and rights of religious and moral conscience of private employers and landlords.⁶⁰ In a free society, these interests are clearly legitimate ones. Indeed, only two years ago the Supreme Court reaffirmed that the “right to exclude others is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”⁶¹

56 *Id.* at 1627. This is what Justice Kennedy presumably meant when he said Amendment 2 “is at once too narrow and too broad.” *Id.* at 1628. The Amendment was too narrow because it “targeted” a “single named group”—homosexuals and bisexuals. *Id.* at 1626-27. It was too broad because it imposed “a broad and undifferentiated disability” on that targeted class by denying them “protection across the board.” *Id.* at 1627-28. The hypothetical initiative does not single out a small group of persons; rather, it applies to a trait—sexual orientation—shared by every single person in the human community, because each one of us has sexual orientation.

57 *Id.* at 1627.

58 *Id.* at 1628.

59 *Id.* at 1627.

60 See Duncan & Young, *supra* note 9, at 130-34.

61 *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

The *Romer* majority specifically addressed these legitimate interests and said that they failed to support Amendment 2 only because the breadth of that provision was "so far removed from these particular justifications."⁶² The hypothetical amendment, however, is not fatally overbroad; there is a reasonable fit between that provision and legitimate governmental purposes.⁶³

Romer does not stand in the way of this initiative. If the Court is to strike it down, it will need to find some other rationale.

2. Marriage Laws

Within a week after the Court announced its decision in *Romer*, David Sobelsohn, a Washington lawyer and former chief legislative counsel of a leading homosexual advocacy group, confidently predicted that "*Romer* will help the constitutional case against state refusal to recognize same-sex marriage" because "[a]fter all, one can also trace that refusal to 'bare animus' against a group of people."⁶⁴ I think this view is based upon a mistaken understanding of both *Romer* and state marriage laws.

Same-sex marriage⁶⁵ has been unanimously and consistently rejected by the laws of every state in this country.⁶⁶ Indeed, at present no country or state *in the world* recognizes homosexual unions as marriages. This unanimous, international, and multicultural consensus on the meaning of marriage has a solid, rational, and clearly legiti-

62 *Romer*, 116 S. Ct. at 1629.

63 The proposed initiative also serves the legitimate interest of preserving "traditional sexual mores against the efforts of a politically powerful minority to revise those mores" by passing local ordinances that equate opposition to sexual immorality with racism and sexism. *Id.* at 1629 (Scalia, J., dissenting).

64 *Getting a Read on Romer v. Evans*, *supra* note 12, at 8. Professor William Eskridge, an articulate academic advocate of the homosexual legal agenda, made the same point in a recent essay calling for legal recognition of homosexual marriage. Eskridge, *supra* note 13, at 11.

65 The phrases "same-sex marriage" and "homosexual marriage," as used in this Article, refer to a legal marriage between persons of the same gender.

66 See Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587, 589 (1996). In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii held that the Hawaii marriage statute, which does not permit same-sex marriage, discriminates on the basis of gender and therefore triggers strict scrutiny under the state constitution. The case was remanded to the trial court to allow the state an opportunity to meet its burden of justifying the marriage law "by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights." *Id.* at 68.

mate foundation that should easily withstand any assault based upon *Romer*.

State marriage laws do not create a broad and undifferentiated disability denying homosexuals "across the board" protection against an infinite number of potential wrongs. These laws have a specific context that easily permits the courts to apply rational basis analysis.⁶⁷

It is crucial to recognize that when homosexual activists seek validity for same-sex marriages they are demanding much more than tolerance. Marriage is a governmentally endorsed and specially preferred legal status that is recognized as fundamentally important to an ordered and healthy society.⁶⁸ The unanimous international consensus supporting conventional marriage is based upon the widely accepted understanding that a man and woman united in marriage "constitute a unit that is more complete, more comprehensive, more whole, more balanced, more complementary, and more liberating than any relationship of two persons of the same sex can ever be."⁶⁹ In other words, the "heterosexual marriage requirement . . . recognizes the unique social importance of the institution of marriage for relationships, complementarity, and generativity that lie at the heart of the social interest in marriage."⁷⁰ Far from being based upon a desire to engage in invidious discrimination for its own sake, conventional marriage laws recognize "the equal contribution of both sexes to an important social institution."⁷¹

The case for conventional marriage laws may be debatable,⁷² but it is neither irrational nor invidious. And *Romer* is no threat to the heterosexual paradigm of civil marriage.

67 The analysis in this Article is limited to the impact of *Romer* on marriage laws. *Romer* applied a rational basis test to Amendment 2. Some commentators have argued in favor of stricter scrutiny for laws that deny recognition to homosexual "marriages." See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

68 See Duncan, *supra* note 66, at 592-93.

69 *Id.* at 596 (quoting Professor Lynn Wardle).

70 Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 85-86.

71 *Id.* at 87.

72 For an articulate argument in support of legal recognition of homosexual marriages, see ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY*, 178-87 (1995).

3. Homosexuals in the Military

The exclusion of homosexuals from military service has a long and interesting history.⁷³ That history, however, is beyond the scope of this Article. Instead, I will focus briefly on the most recent policy regarding homosexuals in the military—the 1993 legislation popularly known as the “Don’t Ask, Don’t Tell” policy⁷⁴—and consider the impact of *Romer* on that controversial rule.

The statutory policy provides that a member of the armed forces shall be separated from service if any one of the following circumstances is shown: 1) the service member engages or attempts to engage in homosexual acts;⁷⁵ 2) the service member states that “he or she is a homosexual or bisexual . . . unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts;”⁷⁶ or 3) the service member “has married or attempted to marry a person known to be of the same biological sex.”⁷⁷ This policy excludes from military service a class of persons defined with reference to conduct or propensity to engage in conduct. Moreover, it creates a rebuttable presumption that self-declared “homosexuals” or “bisexuals” are members of that class. Once this presumption arises, the individual can rebut it only by showing that he or she is not a person who has a propensity to engage in homosexual acts.⁷⁸ In sum, the statutory scheme creates “a class-based exclusion policy premised upon the principle that homosexuality is defined by and inextricably linked to homosexual conduct and is, therefore, incompatible with military service.”⁷⁹

Like the other laws discussed in the two immediately preceding sections of this Article, the statutory policy is sufficiently narrow to

⁷³ See generally MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE (1993); William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. REV. 121 (1995).

⁷⁴ Pub. L. No. 103-160, § 571, 107 Stat. 1670 (1993) (codified at 10 U.S.C.A. § 654 (West Supp. 1996)).

⁷⁵ 10 U.S.C.A. § 654(b)(1). The term “homosexual act” is defined as “any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.” *Id.* § 654(f)(3).

⁷⁶ *Id.* § 654(b)(2).

⁷⁷ *Id.* § 654(b)(3).

⁷⁸ See Woodruff, *supra* note 73, at 155. In other words, a self-declared “homosexual” must demonstrate that he or she is not a “homosexual” as defined by the statutory policy. See 10 U.S.C.A. § 654(f)(1) (defining “homosexual” as “a person regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts”)

⁷⁹ See Woodruff, *supra* note 73, at 155.

enable the courts to ascertain whether it is a reasonable means of furthering legitimate governmental interests. Indeed, the Congressional findings of fact establishing the purpose of and need for the policy provide a reasoned and measured justification for excluding practicing homosexuals (and those with a propensity to engage in homosexual conduct) from military service.⁸⁰ These findings recognize the unique context of military service. The primary purpose of the American armed forces is to "prepare for and to prevail in combat should the need arise."⁸¹ This requires military personnel to make "extraordinary sacrifices" and to accept life in "military units that are characterized by high morale, good order and discipline, and unit cohesion."⁸² William A. Woodruff, a law professor and former chief litigator in the Judge Advocate General's Corps, explains the unique context of military service as follows:

The American Armed Forces are unique. In a government based upon the consent of the governed, the military is autocratic. In a society that treasures individual freedom, the soldier must conform and sacrifice individual freedom for mission accomplishment. In a country where the right to speak one's mind is paramount, the soldier is called upon to defend that right while not enjoying its full extent. To some, it is paradoxical that the defenders of freedom must forfeit their own freedom. Consider the mission of the military, however, and the paradox vanishes. The mission of the United States Armed Forces is to fight and win our nation's wars. It takes an army to do that, not a debating society.⁸³

It is in light of this extraordinary context that the courts must consider the reasonableness of the Congressional determination that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."⁸⁴ Nothing in *Romer* suggests that this determination is an illegitimate basis for Congressional action. Congress did not base its policy upon "bare animus" or invidious bigotry; "[r]ather, it focused on military effectiveness, unit cohesion, the unique nature of military life, and the impact homosexual conduct in the military would have, ulti-

80 10 U.S.C.A. § 654(a).

81 *Id.* § 654(a)(4).

82 *Id.* § 654(a)(5), (6).

83 Woodruff, *supra* note 73, at 123.

84 10 U.S.C.A. § 654(a)(15).

mately, on success on the battlefield.”⁸⁵ As Professor Woodruff has said, the policy “is not ‘anti-gay;’” it is “‘pro-combat effectiveness.’”⁸⁶ Moreover, Congress adopted the policy only after an “exhaustive examination” of the issue “in the Executive and Legislative branches.”⁸⁷ Far from being based upon a visceral dislike of homosexual persons, the policy “reflects month upon month of political negotiation and deliberation.”⁸⁸ Although an exhaustive analysis of the issue of homosexuals in the military is beyond the scope of this Article,⁸⁹ suffice it to say I am confident that *Romer* does not bear upon the issue.

85 Woodruff, *supra* note 73, at 165. When Justice Kennedy was on the Court of Appeals in the Ninth Circuit, he specifically found that the Navy’s “general policy of discharging all homosexuals is rational.” *Beller v. Middendorf*, 632 F.2d 788, 809 n.20 (9th Cir. 1980). This precedent did not escape Justice Scalia’s notice in *Romer*. See *Romer*, 116 S. Ct. at 1632 (Scalia, J., dissenting).

86 Woodruff, *supra* note 73, at 165. Soldiers and sailors often are required to live in “communal settings that force intimacy and provide little privacy.” *Id.* at 161 (quoting General Colin Powell). Woodruff provides a cogent explanation of how homosexuality—in this unique context—can disrupt the bonding and cohesion essential to military effectiveness:

To provide a modicum of privacy in these situations, the military has traditionally segregated bathing and sleeping facilities by gender. The presumption underlying gender segregation is that people are sexually attracted to the opposite sex. Thus, most people view being forced to sleep, shower, and use toilet facilities with members of the opposite sex as an infringement of their privacy. When the underlying presumption is not valid, e.g., when individuals find members of the same gender sexually attractive, the invasion of privacy occurs even in gender segregated facilities. This, in turn, disrupts the bonding and cohesion vital to military effectiveness.

Id. Andrew Koppelman argues that the privacy argument fails because the “sexual gaze” of homosexuals “is not peculiar to the military. Civilians experience it all the time in public restrooms and changing rooms at the beach or in the gym.” Andrew Koppelman, *Gaze in the Military: A Response to Professor Woodruff*, 64 UMKC L. Rev. 179, 190 (1995). This counterargument is unpersuasive. Civilians are not required to share living and sleeping quarters with strangers who may be sexually attracted to them. Woodruff’s point is that even soldiers are entitled to “a modicum of privacy in these situations.” Woodruff, *supra* note 73, at 161.

87 *Thomasson v. Perry*, 80 F.3d 915, 922 (4th Cir.), *cert. denied*, 65 U.S.L.W. 3305 (U.S. Oct. 21, 1996) (No. 96-1). In *Thomasson*, the Fourth Circuit upheld the constitutionality of the statutory policy.

88 *Id.* at 923. The court noted that extensive Congressional hearings were held on the issue and the witnesses who testified at these hearings “represented a broad range of views and backgrounds.” *Id.* at 922.

89 Professor Woodruff’s important article has already performed that task. See Woodruff, *supra* note 73, at 155-78. Woodruff makes an important distinction between the statutory policy and the Department of Defense regulations issued to implement the law. He believes the latter “contradict the expressed views of Congress in several important areas, are inconsistent with the statutory scheme in other respects, and weaken the overall basis of the statute by creating irrational and illogical pre-

III. SUPREME COURT STORYTELLING: HEREIN OF HOMOSEXUAL FUNDAMENTALISM, ATTAINDER, AND KULTURKAMPF

Viewed as legal precedent, *Romer* (as I've suggested) does not even register on the landmark meter. But when the majority and dissenting opinions are read as narratives of contemporary culture, they tell fascinating stories from starkly different perspectives.

A. Justice Kennedy's Story: Fighting for the Right to Be Queer

Justice Kennedy's opinion reminds me of one of my favorite films of the nineties, *Wigstock: The Movie*.⁹⁰ *Wigstock* is a documentary about the drag queen festival held on Labor Day each year in—did you need to ask?—New York City. *Wigstock* is camp. It is outrageous. It is bizarre. It is screamingly funny and wrenchingly sad—just like Justice Kennedy's opinion in *Romer*.

And, also like Kennedy's opinion, the film adopts a viewpoint that can best be described as homosexual fundamentalism. By homosexual fundamentalism I mean a point of view that confidently and aggressively proclaims the self-evident goodness of homosexuality—of "queerness" to use the vernacular of homosexual activism—and concomitantly equates traditional sexual morality with racial bigotry and hatred. This viewpoint is captured by the battle cry of the homosexual rights movement—"We're here. We're queer. Get used to it."⁹¹—and in the rhetoric of homosexual writers such as the late Paul Monette, whose list of "our enemies" included "Nazi Popes and all their brocaded minions [and] the wacko fundamentalists and their Book of

sumptions." *Id.* at 173. For an impassioned response to Woodruff, see Koppelman, *supra* note 86. Professor Koppelman notes that the heterosexual proclivities of male and female officers in the armed forces have also endangered military discipline and suggests ironically that perhaps "the only solution is wholesale castration." *Id.* at 190. For Woodruff's reply to Koppelman, see William A. Woodruff, *A Reply to Professor Koppelman*, 64 UMKC L. REV. 195 (1995).

90 WIGSTOCK: THE MOVIE (Goldwyn 1995). *Wigstock* features performances by Mistress Formika, RuPaul, The Lady Bunny, and (my personal favorite) the Duelling Bankheads, "a pair of dressed-in-black queens who do Tallulah Bankhead singing 'Born to Be Wild.'" Edward Guthmann, *Lady Bunny Goes Uptown in Drag/Mainstream Release for "Wigstock,"* S.F. CHRON., June 20, 1995, at E1. The movie also introduces us to the Wigstock Dancers, a troop of heel-kicking drag queens described in the film as having been "recruited from all over—the Port Authority men's room, Rikers Island, the piers." Barry Shils, the writer and director of *Wigstock*, said in an interview that the film was designed to make drag "mainstream." *Id.*

91 The homosexual activist group Queer Nation has been credited with coining this rallying cry. See Chris Dickinson, *The Music is the Message: Some Radical Gay Bands Put Their Sexuality Way Up Front*, ST. LOUIS POST-DISPATCH, Apr. 21, 1996, at 3C (Magazine).

Lies.”⁹² It is also an important theme of *Wigstock* and is captured best in a song performed by Misstress Formika:

You want to come out, but you don't know how.
 You tell your mom you're gay, and she has a f—ing cow.
 She sends you to a shrink, but it just don't work.
 'Cuz you still feel the same, it's the shrink that's the jerk.
 You've got to fight for your right to be queer.
 You've got to fight for your right to be queer.⁹³

Although Justice Kennedy was less confrontational than Queer Nation, less impassioned than Monette, and less flamboyant than Misstress Formika, their fundamentalism echoes in his majority opinion.

Kennedy's decision to invalidate Amendment 2 on its face is sensible only if—as Akhil Amar suggests—Kennedy accepts the homosexual fundamentalist narrative as the true story of Amendment 2.⁹⁴ According to this story, which is the dominant one among the educated elite in American society,⁹⁵ the Amendment was intended to stigmatize homosexuals as an unclean, untouchable, and unworthy class of persons.⁹⁶ If you believe this narrative, then Colorado is indeed the “hate state” and Amendment 2 is the equivalent of a bill of

92 PAUL MONETTE, *BECOMING A MAN: HALF A LIFE STORY 2* (1992). Monette won the 1992 National Book Award for this autobiographical account of growing up homosexual in America. Monette's hatred for people of faith and the Word of God calls to mind the following proverb: “An unjust man is an abomination to the righteous, and he who is upright in the way is an abomination to the wicked.” *Proverbs* 29:27. Of course, the reason we are waging Kulturkampf is we don't agree on the identity of the “wicked” and the “upright.” However, it is clear that homosexual fundamentalists—such as Monette—believe that traditional Christianity is homophobic and, therefore, an abomination. Justice Kennedy's opinion in *Romer*, while not going this far, employs some of the same frightening rhetoric.

93 *WIGSTOCK: THE MOVIE* (Goldwyn 1995). Misstress Formika, whose real name is Michael, also provides a less theatrical analysis of contemporary culture. Offstage and sans wig, she/he observes: “They're trying to brainwash us to be prejudiced, to be close-minded, to be Republicans. It's not going to happen. Not as long as I'm around.”

94 Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 207, 223-24 (1996).

95 Professor Stephen Gillers agrees that Kennedy's opinion is a product of the dominant insider narrative. As he puts it, the *Romer* majority simply seemed to be saying “We read the press and the better magazines” and we understand that Amendment 2 is based upon “hate and we won't tolerate hate, so beat it.” *Getting a Read on Romer v. Evans*, *supra* note 12, at 8.

96 Amar, *supra* note 94, at 224.

attainder,⁹⁷ a law serving no purpose other than a “bare . . . desire to harm a politically unpopular group.”⁹⁸

Professor Amar makes an admirable attempt to persuade us that “Justice Kennedy’s opinion reaches the right result, and for the right reason.”⁹⁹ Amar argues that Amendment 2 is like a bill of attainder because it names a class of persons and pins a “badge of opprobrium” on members of the class based upon their status.¹⁰⁰ It was, says Amar, “a kind of ‘No Queers’ sign writ large,”¹⁰¹ a “legal and social outlawry in cowboy country—a targeting of outsiders, a badge of second-class citizenship, a tainting of queers, a scarlet Q.”¹⁰²

Amar argues that Amendment 2 is like a law that provides: “Akhil Reed Amar shall be placed in the public stocks for two hours. His private parts shall be painted red. Passersby may mock, insult, and humiliate him.”¹⁰³ Or one that provides: “Akhil Reed Amar shall be ineligible to be a government employee or a union leader.”¹⁰⁴ These laws violate the non-attainder principle, Amar argues, because their “purpose and social meaning . . . is to stigmatize or degrade a named person—to ‘taint’ or ‘stain’ him, or to label him as less worthy or deserving of less respect or trust than his fellow citizens”¹⁰⁵ He says Amendment 2 violates this non-attainder principle because “there is a right not to be singled out by name in a law that, metaphorically speaking, paints one’s private parts red.”¹⁰⁶

Interestingly, Professor Amar believes there would have been no attainder problem if Amendment 2 had been symmetrical. In other words, a law that provides *sexual orientation* may not be a protected trait under anti-discrimination laws would pass muster, because such a law would not single out a particular class of persons as untouchable and unclean.¹⁰⁷ I doubt if this formal revision would have satisfied the

97 See Amar, *supra* note 94.

98 *Romer*, 116 S. Ct. at 1628 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

99 Amar, *supra* note 94, at 222. Amar’s analysis of *Romer* is thoughtful, creative, and provocative. However, it is unpersuasive because it is based on the same unrealistic narrative that animates Kennedy’s opinion. For a discussion of why the narrative of homosexual fundamentalism is not the true story of Amendment 2, see *infra* notes 120-54 and accompanying text.

100 Amar, *supra* note 94, at 214.

101 *Id.* at 207.

102 *Id.* at 208.

103 *Id.* at 211.

104 *Id.* at 212.

105 *Id.* at 213.

106 *Id.* at 219.

107 See *id.* at 207, 224-25.

Romer Court. The revised amendment would still prohibit laws, regulations, and policies designed to protect the trait of sexual orientation against "an almost limitless number" of conceivable wrongs.¹⁰⁸ For example, the revised amendment would not cure the parade of horrors—involving such things as police protection and library services—produced by the Court's obsession with the *conceivable* reach of Amendment 2.¹⁰⁹ Although Amar's attainer analysis provides an interesting angle from which to view *Romer*, the case was decided as "an ordinary equal protection case," and substituting the trait of sexual orientation for that of homosexuality in the text of the Amendment should not significantly affect its review under the rational basis test. Its "sheer breadth" would seemingly still be seen by Justice Kennedy as discrediting any legitimate justification put forward on its behalf.¹¹⁰

Amar is correct, however, when he observes that the majority opinion is animated by the homosexual fundamentalist narrative.¹¹¹ It is surely no accident that Justice Kennedy begins his story by quoting Justice Harlan's famous dissent in *Plessy v. Ferguson*:¹¹² "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'"¹¹³ Of course, Kennedy understands that notwithstanding Harlan's famous aphorism the Constitution does indeed tolerate all sorts of classes.¹¹⁴ Most laws divide citizens into classes (the poor get food stamps, the wealthy do not; the elderly receive social security payments, the young pay social security taxes), and most laws do not violate the Equal Protection Clause. As Justice Rehnquist once put it, the

108 *Romer*, 116 S. Ct. at 1627.

109 See *supra* notes 47-53 and accompanying text.

110 See *supra* notes 47-50 and accompanying text. I am not arguing that the asymmetry of Amendment 2 was irrelevant to the decision in *Romer*. Justice Kennedy clearly believed that Amendment 2 was "at once too narrow and too broad." *Romer*, 116 S. Ct. at 1628. See *supra* note 56. The revised amendment cures the "narrowness" problem by denying protection not only to "homos and bis" but also to "heteros." Amar, *supra* note 94, at 207. However, the revision leaves uncorrected the excessive breadth problem, and this is probably sufficient to run afoul of the majority decision in *Romer*. For an example of a revised amendment that cures both the narrowness and the breadth problem, see *supra* Section II.C.1.

111 Amar, *supra* note 94, at 223-24 ("Justice Kennedy's opinion ranges beyond text and form to ponder the exclusionary social meaning beneath the surface of Amendment 2."); see also *id.* at 207.

112 163 U.S. 537 (1896).

113 *Romer*, 116 S. Ct. at 1623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). You do not need to be Fellini to understand the symbolic significance of Kennedy's rhetorical linkage of *Romer* and *Plessy*. See Amar, *supra* note 94, at 222-23.

114 *Romer*, 116 S. Ct. at 1627.

problem presented by the Equal Protection Clause is one of sorting through mounds of perfectly legitimate legislative distinctions in order to isolate and invalidate those few "which involve invidiously unequal treatment."¹¹⁵

But Kennedy saw Amendment 2 as denying protection to homosexuals "across the board"¹¹⁶ and thereby raising "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."¹¹⁷ Kennedy's fundamentalism made it impossible for him to see anything but a "bare desire" to harm homosexuals motivating the people of Colorado when they enacted Amendment 2.¹¹⁸ It made it impossible for him "to credit" the many legitimate justifications offered in support of the Amendment.¹¹⁹ In other words, his narrative blinded him to the social reality of Amendment 2, a reality that is much more complex and nuanced than the black and white dogmatism of Kennedy's insider narrative.

B. Justice Scalia and the *Kulturkampf*

Justice Scalia's dissenting opinion in *Romer* has been criticized harshly by a number of legal scholars and pundits. Professor Amar calls it "derisive"¹²⁰ and "uncharitable."¹²¹ William Lockard said he was "infuriated" by "the hatefulness bubbling underneath the dissent"¹²² and terrified by "Scalia's skillful weaving of an emotional anti-homosexual motif through his text."¹²³ Richard Rodriguez stigmatized the opinion as "venomous."¹²⁴ Although I believe the dissent is none of these things, I am not surprised at this reaction. Scalia explicitly rejects the homosexual fundamentalist narrative as the true story of Amendment 2 and, of course, that makes him a "homophobe" and a "bigot" to insiders such as these critics.¹²⁵

115 *Trimble v. Gordon*, 430 U.S. 762, 779 (1977) (Rehnquist, J., dissenting).

116 *Romer*, 116 S. Ct. at 1628.

117 *Id.*

118 *Id.*

119 *Id.* at 1629.

120 Amar, *supra* note 94, at 228.

121 *Id.* at 234.

122 *Getting a Read on Romer v. Evans*, *supra* note 12, at 8. Lockard, a vice president and legal counsel of MGM, also called the dissent "vicious" and "homophobic." *Id.*

123 *Id.*

124 Richard Rodriguez, *The Revolution Occurs by the Christmas Tree*, BALTIMORE SUN, May 24, 1996, at 23A.

125 For a discussion of the meaning of "homosexual fundamentalism," see *supra* notes 91-93 and accompanying text.

Like Justice Kennedy before him,¹²⁶ Justice Scalia wasted no time before telling his version of the Amendment 2 story. "The Court," said Scalia:

has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.¹²⁷

In contrast to Kennedy's simplistic "hate state" fundamentalism, Scalia understood that Amendment 2 has a history, and its purpose can be gleaned only by one who takes account of that history.¹²⁸

Amendment 2 is part of a complex struggle between modernism and traditionalism, between competing and conflicting notions of the good life. The Amendment was not a mean-spirited attempt to stigmatize, degrade, or "taint" a class of persons. Rather, it was a defensive measure designed to prevent the law's coercion from being used to legitimize homosexuality and delegitimize traditional notions of sexual morality.¹²⁹

In a 1993 law review article, Professor Larry Yackle declared that "American society is now absorbed in yet another great civil rights movement, this one on behalf of gay, lesbian, and ambisexual citizens, which will lead ineluctably to the elimination of legal burdens on the basis of sexual orientation."¹³⁰ Moreover, when this codification of the sexual revolution is accomplished, "private homophobia, deprived

126 See *supra* notes 112-13 and accompanying text.

127 *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

128 Justice Scalia noted that persons "who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities" and often amass substantial political power in those communities. *Id.* at 1634. This political power can be used to enact laws designed to produce "not merely a grudging social toleration, but full social acceptance, of homosexuality." *Id.* Scalia then placed Amendment 2 in its social context, explaining that by the time Colorado citizens were asked to vote on the initiative "their exposure to homosexuals' quest for social endorsement" had been informed by enactment of restrictive gay rights laws in Aspen, Boulder, and Denver. *Id.* These laws, noted Scalia, had the effect of "equating the moral disapproval of homosexual conduct with racial and religious bigotry." *Id.*

129 I have written extensively elsewhere of the stigmatization of traditionalists by gay rights laws such as those passed in Denver, Aspen, and Boulder. See Duncan & Young, *supra* note 9, at 124-30. Viewed against this background, Amendment 2 was designed not to stigmatize and harm homosexuals, but rather to remove the stigma and associated harms inflicted on traditionalists by state and local gay rights laws. *Id.* at 129.

130 Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791 (1993).

of legal sanction, will . . . be discredited and forced to the margin.”¹³¹ As the people of Colorado understood, this “private homophobia” that is to be discredited by the educative effects of laws enacting homosexual rights is what others call “traditional sexual morality,” and the “homophobes” who are in the process of being stigmatized and marginalized are ordinary people like themselves. In other words, they came to understand the social meaning of “We’re here. We’re queer. Get used to it.”¹³² It was the “get used to it” part that informed and animated support for Amendment 2 among these “seemingly tolerant” Coloradans.¹³³

Justice Scalia understood the social reality of Amendment 2, and he ridiculed the majority’s unrealistic “portrayal of Coloradans as a society fallen victim to pointless, hate-filled ‘gay-bashing’ so false as to be comical.”¹³⁴ Not only had Colorado repealed its antisodomy laws, observed Scalia, but it was one of the first states to do so.¹³⁵ However, three cities in Colorado had gone well beyond the point of tolerating homosexual conduct and had passed laws “equating the moral disapproval of homosexual conduct with racial and religious bigotry.”¹³⁶ This, said Scalia, is all well and good. Homosexuals, like everyone else in a democratic society, are “entitled to use the legal system for reinforcement of their moral sentiments.”¹³⁷ However, those who use the system to impose their moral preferences on others should not be heard to complain when their agenda is “countered by lawful, democratic countermeasures” such as Amendment 2.¹³⁸

Not only did Justice Scalia understand this complex social reality of Colorado, he also understood the social reality of the Supreme

131 *Id.* at 792.

132 This phrase has become the rallying cry of the homosexual rights movement. See *supra* note 91 and accompanying text. Its social meaning is one of intolerance. It tells traditionalists that “homosexuality is good and legitimate, and if you have a problem with that you are going to have to change.” Indeed, if we accept the major premise—a premise that declares the equal goodness of homosexuality, bisexuality, and heterosexuality—the logic is compelling. If homosexual unions are good and legitimate, institutions and persons who proclaim traditional sexual morality are “homophobic” and roughly equivalent to the Ku Klux Klan and similar racist organizations. If homosexuality is good, the Bible—as it is understood by traditional Jews, Catholics, and Protestants—is hate literature. If homosexuality is legitimate, Paul Monette was a prophet, not a religious bigot. See *supra* note 92 and accompanying text.

133 See *supra* text accompanying note 127.

134 *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting).

135 *Id.*

136 *Id.* at 1634.

137 *Id.*

138 *Id.*

Court and, more generally, of the legal profession. In one of the most candid assessments of the Court and the legal system ever written in a Supreme court opinion, Scalia implied that traditionalists cannot receive a fair hearing in litigation raising issues such as those in *Romer*:

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers¹³⁹

In other words, elite institutions like the Court and legal academia have accepted homosexual fundamentalism as true and are committed to “stamp[ing] out” the “more plebeian” narrative that equates *gay rights* with *special rights*.¹⁴⁰ Thus, the decision by the majority in *Romer* was “an act, not of judicial judgment, but of political will.”¹⁴¹

C. A Personal Narrative

It should already be obvious which of the *Romer* narratives I believe best captures the “true” story of Amendment 2. The people of Colorado did not vote for the Amendment out of hatred or animosity for gays and lesbians. They believed that gay rights legislation, such as that enacted in Aspen, Boulder, and Denver, sweeps beyond the point of tolerance and grants “special rights” to homosexuals.

I was an advocate in *Romer*. I wrote an amicus brief in support of the Amendment.¹⁴² My personal support for the Amendment was

¹³⁹ *Id.* at 1637.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See Brief of Amici Curiae States of Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and Virginia in Support of Petitioner, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039). I wrote the brief with Charles Cooper, who appeared as Counsel of Record.

animated by libertarian considerations. As I have argued at length elsewhere,¹⁴³ I believe Professor Yackle is correct when he links enactment of gay rights laws with the discrediting and marginalization of traditional notions of sexual morality and religion.¹⁴⁴ As Justice Scalia understood, laws that list sexual orientation as an impermissible ground for private discrimination have the educative effect of "equating the moral disapproval of homosexual conduct with racial and religious bigotry."¹⁴⁵ It is in this sense that laws prohibiting discrimination on the basis of sexual orientation grant "special rights."

When a state or local government codifies the sexual revolution by treating sexual lifestyles as protected categories under antidiscrimination laws, it stigmatizes, marginalizes, and silences religious and moral traditionalists and fences them out from authentic participation in the economic and social life of the community.¹⁴⁶ Consider the case of Evelyn Smith, a devout Christian widow who is trying to raise her children on the rental income generated by two duplexes she owns in Chico, California.¹⁴⁷ Smith refused to rent to an unmarried couple who wished to cohabit in one of her apartments because she "believes that sex outside of marriage is sinful, and that it is a sin for her to rent . . . to people who will engage in nonmarital sex on her property."¹⁴⁸ The California Supreme Court held that the state fair housing laws protected unmarried cohabitants from discrimination and that Mrs. Smith was not entitled to a religious freedom exemption.¹⁴⁹

A full and complete analysis of *Smith* is beyond the scope of this Article. I wish to focus on only one significant thread of the case: the court's refusal to recognize that Smith's religion was "substantially burdened" by the coercive impact of a law requiring her to do what her religious conscience condemned as a sin.¹⁵⁰ The court held that Smith's religious freedom was not substantially burdened because she

143 See Duncan, *supra* note 66.

144 See *supra* note 130 and accompanying text.

145 *Romer*, 116 S. Ct. at 1634 (Scalia, J., dissenting). Andrew Koppelman agrees that gay rights laws "implicitly tell those whose religious beliefs sanction such discrimination that their religious beliefs are false and that they ought to change them." ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 152 (1996)

146 See Duncan & Young, *supra* note 9, at 126.

147 See *Smith v. Fair Employment & Hous. Comm.*, 51 Cal. Rptr. 2d 700 (1996).

148 *Id.* at 703.

149 *Id.* at 705-22.

150 Under the Religious Freedom Restoration Act, government may not "substantially burden a person's exercise of religion" without a compelling justification. 42 U.S.C. § 2000bb-1 (1994). Thus, the "substantial burden" standard is the threshold for protection of religious freedom under the Act.

had the option of "selling her units and redeploying the capital in other investments."¹⁵¹ The fact that rental income from her duplexes was the "major source of income" for Mrs. Smith, a widow, and her children apparently was irrelevant.¹⁵²

In other words, when people of faith choose to engage in commercial activities in California they waive their right to religious freedom. If the state's restrictive commercial laws conflict with the exercise of religion, believers are free to go out of business or move to a more tolerant state. "We're here. We want to shack up on your property. And if you can't get used to it, get out of business, you religious bigot!" That was the lesson Mrs. Smith learned when she asked the California Supreme Court to protect her religious freedom against restrictive laws codifying the values of the sexual revolution. The "legal and dignity interests" of unmarried cohabitants were too important to yield, even a little, to the demands of God on Mrs. Smith's business ethics.¹⁵³ The world has indeed turned upside down, and good has become evil and evil good.¹⁵⁴

I supported Amendment 2 because I understood the stigmatizing effect of gay rights laws on persons who cling steadfastly to traditional notions of sexual morality in post-modern America. The sexual revolution has wreaked havoc on the quality of life in our society. It has infected our corporate health, polluted the popular culture, and damaged the lives of countless children and families.

Individual liberty and religious freedom are also beginning to turn up on the casualty list. When the state codifies the sexual revolution and treats human sexuality as a protected civil rights category, it slanders traditional morality and constrains individual liberty and freedom of conscience. I believe the people of Colorado understood this when they voted for Amendment 2. Thus, they were motivated not by irrational animus, but by the spirit of liberty and tolerance.

151 *Smith*, 51 Cal. Rptr. 2d at 716. Interestingly, the court stated that the "proposition that a burden on religion is not substantial if one can avoid it" by going out of business is not "a generally applicable test for identifying substantial burdens." *Id.* Apparently, it is a special rule that applies in special cases such as when the court wishes to advance the "dignity interests" of unmarried cohabitants. *Id.*

152 *Id.* at 737 (Kennard, J., concurring and dissenting).

153 *Id.* at 716.

154 Isaiah's prophetic wisdom has never been more timely: "Woe to those who call evil good, and good evil; Who put darkness for light, and light for darkness; Who put bitter for sweet, and sweet for bitter!" *Isaiah* 5:20.

IV. CONCLUSION

It bears repeating that the Supreme Court's decision in *Romer* is of trivial doctrinal import. The Court did not recognize homosexuals as a suspect or quasi-suspect class, nor did it reverse or undermine its landmark decision in *Bowers v. Hardwick*. Moreover, the narrow holding of *Romer* suggests quite strongly that typical laws disadvantaging homosexuals—the military exclusion, the heterosexual paradigm of civil marriage, and perhaps even better-crafted and more narrow versions of Amendment 2—do not offend the Equal Protection Clause. These laws rationally advance legitimate government interests and should easily pass scrutiny under the rational basis test applied by the majority in *Romer*.

However, the majority and dissenting opinions in *Romer* are significant in one respect—they tell clashing and fascinating stories about the culture war that is currently raging in our pluralistic and disunited society. Justice Kennedy paints a surrealistic picture of Colorado as the hate state. This is the narrative of homosexual fundamentalism, and it is the one that is currently dominant among America's progressive elites. Justice Scalia's story of the Kulturkampf is more trenchant. Scalia understands that Amendment 2 was an attempt by "tolerant Coloradans" to prevent civil rights laws from being used to legitimize homosexual conduct and delegitimize traditional notions of sexual morality. Kennedy's fundamentalism blinded him to the social reality that the citizens of Colorado had many rational and legitimate reasons for supporting a constitutional amendment designed to invalidate laws which conflate the values of the sexual revolution with those of the civil rights movement. Scalia understood these complexities of modern America; and for all the public criticism his opinion has received from the Templar class in society, it rings true.